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IN THE

Supreme Court of the United States

October Term, 1946

No. 910

JANE V. BUCKNER and LEON BUCKNER
Petitioners,

vs.

FRED A. TWEED, trading as F. A. TWEED COMPANY
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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OPINION BELOW

This case was heard first in the trial Court July 9, 1943, and resulted in favor of petitioners; from there, it was taken by appeal to Municipal Court of Appeals and decision was reversed with instructions to grant a new trial; case was heard in trial Court again, findings for respondent; and in the second appeal to the Municipal Court of

Appeals, the trial Court's decision was affirmed; from there it was appealed to United States Court of Appeals and the judgment of the Municipal Court was affirmed; petition for Rehearing was denied Oct. 21, 1946.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Acts as follows:—Feb. 13, 1925, ch. 229, Section 1, 43 Stat. 938; Jan. 31, 1928, ch. 14, Section 1, 45 Stat. 54; June 7, 1934, ch. 426, 48 Stat. 926.

QUESTIONS PRESENTED

1. The question is whether the terms in an ordinary contract for the sale of real estate, providing for cash payment and the amount and character of the deed of trust to secure the balance of the purchase price, become a matter of form only, and are these terms merely a statement of what the purchaser can do, and not a condition that can be insisted upon by the owner. In other words are these essential terms in a sales contract a statement of a privilege only and can the purchaser at will increase the cash payment, lower the amount of the deed of trust, without the consent of the other party to the agreement and even against his wishes. Can the purchaser vary the terms of his contract of sale without the consent of the owner merely by showing that the terms of the altered contract are more advantageous to the owner.

2. The question is whether the sales contract was a valid and enforceable and whether an invalid contract would even give respondent an employment contract, and is not in violation of Rights of Persons—Due Process Law Clause of the 5th Amendment to the Constitution of the United States.

3. Whether the question regarding the District Court of Appeals in supplying the words "material deviation" instead of "identical terms" as used in case referred to was not to be regarded as overruling the *Heurich v. Sullivan* case, 52 App. D. C. 95, without saying so, and whether this was not going beyond the judicial prerogatives of that Court by in effect repealing that law, and is this not in violation of the Judicial Power under Article III of the Constitution of the United States.

4. Whether in the argument for Rehearing which the United States Court of Appeals denied in reference to questions not anticipated before such decision affirming judgment of Municipal Court were received was not in violation of the "Right to be Heard" under the Procedural Due Process Law under the provision of the 5th Amendment to the Constitution of the United States as to such questions as follows: (a) the validity of a contract, (b) applying the words "material deviation" to the *Heurich* v. *Sullivan* case, (c) a broker being able to explain to a potential purchaser the advantages of a too-high-first-trust written into a contract, (d) beneficial results of a remedy suggested that might appear that way to other parties other than all parties to a contract, (e) that a breach by a purchaser should not necessarily entitle the purchaser to special considerations.

5. Whether in requesting a Clarification which was denied, such questions raised by the United States Court of Appeals that required further explanation of the terms used in the decision was not also in violation of the Procedural Due Process Law of the 5th Amendment to the Constitution of the United States. Such questions that were earnestly requested explanations were as follows: (a) an agent being able to collect a commission when there is no binding contract between purchaser and seller, (b) in what way does the "letter of instruction" that was intended merely to postpone the settlement date subtract

or enlarge the terms of the alleged contract of April 18, 1943; (c) when does a binding statement in a contract become a privilege and not a condition, (d) was there any evidence produced to show purchaser was ready, and able to carry out the terms of either the original contract or the substitute plan of financing.

6. Whether the question of granting purchaser having a second trust made to another party other than the petitioners which was on deposit with the Title Company, and considering such trust as money was not together with questions under the following number of questions designated 7 and 8 against Equal Protection Clause under Rights of Citizens as guaranteed under the 14th Amendment to the Constitution of the United States.

7. Whether a too-high-first-trust as explained (Appdx. 23) placed into a contract allowing purchaser to claim he has not ample funds with a smaller first trust would in most cases allow the purchaser to withdraw from the sale to the detriment of those relying on such a sales contract was not also against public policy.

8. Whether the question of mutuality of a contract is not required in order to maintain a suit for damages.

SUMMARY STATEMENT OF MATTER INVOLVED

This case was heard in the United States Court of Appeals for the District of Columbia and is based upon a commission of $847.50 on an alleged contract of sale. This is a suit to prevent respondent from collecting a commission on an alleged contract of sale in which no sale had been consummated, the property involved in this case at that time is situated at 5439 42nd St. N. W., Washington, D. C., which property was then owned throughout the year, 1943 by one of the petitioners. The property was first listed for sale January 24, 1943 for $19,500.00, which contract of employment expired nearly two months previously to when the alleged contract of sales was signed by

purchaser and petitioners on a Sunday of April 18, 1943. No other written agreement of employment was in force at the time the alleged contract of sales was signed by petitioners.

The petitioners signed an alleged sales contract that had previously been signed by a potential purchaser of said property with a selling price and terms stated therein. The sale failed to be consummated and respondent resorted to litigation to collect commission on the alleged sales contract.

On April 18, 1943, respondent submitted an offer in triplicate from purchaser for $16,950.00, terms $3,500.00 cash, purchaser "to place" an $11,000.00 first trust, balance to be secured by a second trust for $2450.00 payable $48.00 per month. This second trust to be made to one of petitioners. At that time the property was subject to a deed of trust for $9,500.00, upon which there was a balance aggregating $6,100.00 payable monthly at the rate of $62.50. There was also a provision in the deed of trust limiting the amount of payment in any one year. The cost of prepaying first trust was approximately between $700.00 and $800.00. After some discussion, defendants agreed to accept the offer, providing they were assured that they would not be required to bear any expense in obtaining a release of this trust. They required a provision to this effect, which respondent wrote on the back of the offer, as follows:

> "It is understood that the sellers are not to pay any bonus—or penalty to pay off loan—on the existing first deed of trust to The Evening Star or holder of the said deed of trust. This the 18th day of April 1943
>
> F. A. Tweed Co.
> (s) F. A. Tweed"

Thereupon the petitioners signed the form of contract as thus modified. After having secured the petitioners'

signatures, respondent through one of his representatives, called on the potential purchaser, the next day which was Monday and obtained his consent to add to the proposed agreement, above the signatures of the purchaser and petitioners the following language:

> "4/19/43 Purchaser agrees to pay not over $43.00 bonus to pay off existing first trust. H. J. K."

This modification of the proposed agreement was not submitted to, or approved by the Appellants. (Appdx. 30)

The endorsement on the back of the proposed agreement made at the instance of petitioners was not placed on the proposed purchaser's copy and was never approved in writing by him, respondent claimed he consented verbally to the modification but purchaser denied this, indicating his belief that the endorsement had nothing to do with him personally (Appdx. 20)

Sundry efforts were made to complete the sale. These failed, however, because the existing first trust was not released (Appdx. 16) thereby making it impossible to place a new first trust for $11,000.00; the respondent requested petitioners to pay to obtain release of that trust. (Appdx. 17) Each had what purported to be a copy of the contract, but the provisions in copy of purchaser differed with the one held by petitioners.

Respondent conferred with Saul Company and with an official of the Evening Star Company and learned that they desired to hold the loan and would increase the loan to $9,500.00 but would not increase the loan to $11,000.00 as stipulated in the terms of the contract. Further they would not accept $1,500.00 from purchaser and write down the amount as a $11,000.00 trust and immediately give credit of $1,500.00 as payment on same. With the $3,500.00 second trust made to brother of purchaser this extra amount of money could have been furnished by purchaser; but, that

would not have given the petitioners a second trust made to one of the petitioners for $2450.00.

Petitioners were notified by registered mail by purchaser through respondent that a settlement meeting would be held on May 6, 1943, and that everything would be ready for settlement, but when petitioners arrived at the Title Company, the second trust for $2450.00 had not been even ordered (Appdx. 16) but instead a second trust for $3,500.00 made to brother of purchaser was on deposit with the Title Company to take care of an all cash proposition but the contract did not call for an all cash deal. So purchaser was not ready to consummate the sale and breeched the contract on May 6th, 1943, but petitioners waived that breach by postponing the settlement until May 18th, 1943. (R. 75) by depositing a signed deed and a letter of instruction. On May 12th, one of petitioners withdrew the signed deed but he had it with him at the May 18th settlement meeting. (Appdx. 27)

At the May 6th, 1943 settlement meeting there was a first trust on deposit for $9,500.00 from the holder of the then existing trust, and one for $10,500.00 from the bank of the purchaser, but no $11,000.00 first trust was on deposit or a second trust made to one of petitioners for $2450.00. Respondent proposed a substitute plan of financing with a $9,500.00 first trust but that was not in accordance to the terms of the alleged contract and further purchaser did not propose that substitute plan of financing with a second trust to be made to one of petitioners.

At the May 18th, 1943 settlement meeting the purchaser had obtained a $11,000.00 first trust from a different source than the holder of the petitioner's trust and had a $2450.00 second trust made to one of petitioners and cash $3,500.00. But as the then existing trust could not be released without paying interest to maturity and as no one offered to pay to obtain a release of that trust, the $11,000.00 first trust could not be placed. And further the purchaser

never had on deposit with the Title Company $5,000.00 in checks or cash (Appdx. 18); so, that the deal could not have been closed according to the substitute plan as suggested by respondent on May 6th, 1943.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The decision of the United States Court of Appeals involves "important questions of Federal law which has not been but should be settled by this Court.

2. The United States Court of Appeals has decided Federal questions in a way probably in conflict with the Supreme Court on cases relied upon.

3. The United States Court of Appeals has decided a Federal question by supplying words to a particular case relied upon probably in a way not applicable to Supreme Court decisions.

4. The decision of the United States Court of Appeals in not answering vital questions pertaining to the instant case or clearly explaining certain construction of the lower Court's decision in a way probably not in accordance to applicable decisions of this Court.

5. The decisions of the United States Court of Appeals in not weighing properly Federal questions as to their importance to the general public in a way probably in conflict with Supreme Court decisions.

6. The United States Court of Appeals has decided a question in relation to the obligation of a contract by construing a condition in a contract to be a privilege granted to one party in the contract, and in this way decided a Federal question probably in a manner which has not been but should be settled by this Court.

ARGUMENT

I

The Decision of the Court below in deciding a question in relation to the terms of a contract has supplied words in explanation of such terms that affect the contract itself that has not been but should be settled by this Court.

In reference to the terms of the contract, the United States Court of Appeals in their decision on page 3, stated as follows:

> "In purpose and therefore in effect, it was not a condition upon which appellants insisted but a privilege which they allowed the purchaser."

The above quotation in reference to the $11,000.00 first trust as stipulated in the alleged contract of sale. It does not seem reasonable to arrive at such conclusions when the terms of an ordinary contract expresses an obligation.

In *Bedford* v. *Easter Bldg. & Law Assoc.,* 181 U. S. 227, 21 Sup. Ct. Rep. 597, The Court said:

> "The obligation of a contract is the law which binds a party to perform their agreement."

In another case it explains in general the effect of changing terms of a contract. In *Ogden* v. *Saunders,* 25 U. S. 213, 12 Wheat 213, 6 L. Ed. 606, Justice Washington is quoted as saying:

> "A law affecting the validity, the construction, the duration, the mode of discharge or evidence of agreement impairs the contract."

It seems to be a possibility that under decisions in common law the respondent and petitioners would have been protected in executing the contract but that now through retrospective decision of the lower Court they are deprived in making such contracts with certainty as to its terms as

stipulated therein; such a decision depriving petitioners to make contracts of their own choosing which persons had the right to do and probably still have that right in other jurisdictions; and, which persons in other lines of business may make and that it therefore deprives them of the equal protection of the laws, and that in these respects it violates the provision of the 14th Amendment of the Federal Constitution.

If the alleged contract was valid after the following legal day and after the notation written above petitioners' names was added thereto without petitioners' consent then the following case might apply. In *Havemeyer* v. *Iowa County,* 3 Wall 294, The Court said:

> "If a contract, when made was valid by the Consituation and laws of the state as then expounded by the highest state authorities, no subsequent action by the state legislature or judiciary can impair its obligation."

In another case in reference to an established law, the Court in *Larned* v. *Burlington,* 4 Wall 275, said:

> "The obligation of a contract valid by the laws of the state at the time it was entered into by the parties, cannot be impaired by a subsequent act of the legislature or by a decision of the courts."

If the lower Courts decision in stating that the terms as stipulated in the contract are not a condition but a privilege, then it is obvious the difficulty that will be faced in discerning those terms in a contract that are not binding conditions and those that are only a privilege which can be changed by the will of one party to the contract without the consent of the other party thereto.

Such a decision as to the instability of the terms of a contract probably violates the right of parties to make their own contracts—a right guaranteed by the 5th Amendment to the Constitution of the United States under the Due Process Law.

In the case of *Dartmouth College* v. *Woodward*, 4 Wheat 518, The Court said:

> "All contracts which concern property or some object of value, and confer rights which may be asserted in a Court of justice, are within the constitutional provision against laws impairing the obligation thereof."

The right to dispose of property at a price as agreed upon by the parties to a contract is guaranteed by the constitution. In *Tyson & Bros.* v. *Benton*, 273 U. S. 418, 47 Sup. Ct. Rep. 426, The Court said:

> "The right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself, and as such within the protection of the due process clause of the Federal Constitution."

Parties being hindered by judicial decisions to express binding terms on which agreement is reached as to those terms to dispose of their property is unconstitutional and void; and to impose obstructions from being able to adhere to strict compliance of the terms by one of the parties to the contract is probably not within the scope of the judicial power under common law procedure.

As such decisions are of a discriminating character which results in arbitrary restriction upon the fundamental right of citizens to control his or her own choosing as set forth in contracts.

But, if by such decisions, citizens have lost the capacity to make contract and thus lose property rights protected by the Due Process Law of the 5th Amendment, it is thus in violation of the Federal Constitution. The right of every individual must stand or fall by same rule of law that governs every other member of the body politic or land under similar circumstances; and every Court decision that might be construed contrary to such laws which propose

to destroy or affect individual rights or does the same thing by affording remedies leading to similar consequences is unconstitutional and void.

The privilege of contracting is both a liberty and a property right and it is probably clear to this Court that he is deprived of both liberty and property to the extent that terms on which he contracts to sell his property are not binding conditions but a privilege that can be changed by the arbitrary rule of the judiciary in common law proceedings.

II

The United States Court of Appeals has referred to a number of cases which in a way probably this Court will not find applicable to this instant case.

The line of cases under note 2, page 3, of the decision present a variety of cases, first two of which refer to enrichment cases involving part performance. In this instant case no benefits accrued the petitioners by the part payment of purchaser. In another a written offer was submitted and vendor would not sign contract. In this instant case petitioners signed an alleged contract and no other contract was presented to petitioners for their signatures. In another a change of attorney was an excuse. Such an excuse was not presented in this case at bar for consideration. In the last case cited under note 2, a written offer was submitted in accordance with the terms of the oral listment but vendor refused to sign contract, but on the other hand the Court, in this case said:

> "In order for the broker's commission to be earned, the offer of a seller must be accepted by the purchaser unequivocally, unconditionally, and without variance of any sort."

In the case cited under note 3, of the decision of the lower Court, the vendor in the case sold the property to

another after being offered a good price. In this instant case petitioners didn't sell for over one year later and then through a brokerage concern; further petitioners were ready to settle and had the signed deed on deposit and surely the deal could have been consummated on that very day of May 6th, 1943; and, at the next settlement meeting one of the petitioners had the signed deed with him ready for settlement had purchaser made tender according to the stipulations in the contract or even according to the substitute plan of financing, but at neither settlement meeting was a tender made sufficient to consummate the sale, unless someone would have secured release of the then existing trust.

In the Restatement of the Law of Agency, section 445d cited under note 4 in decision of lower Court it seems if any analogy is to be drawn from that section it follows respondent is not entitled to a commission.

Under note 5, the arguments advanced under these references do not seem to be in harmony with the instant case.

Under note 6, cited in decision of the lower Court, this case in Equity, does not seem applicable to this instant case before this Honorable Court.

In reference to note 1, regarding the *Heurich* v. *Sullivan* case, this case will be explained more fully in the following paragraph:

III

The decision of the United States Court of Appeals based its decision on the purchaser's ability to change the cash payment and amount of the first trust without the consent of petitioners by supplying the words "material deviation" to the Heurich v. Sullivan case.

The District Court of Appeals based its decision regarding the substitute plan of financing on the *Heurich* v. *Sullivan case*, 52 App. D. C. 95, 281 Fed. 591, which seems to be the controlling case, and it was also mentioned by petitioners and probably in a number of ways will not be found at variance to the instant case. But in order to refer to the *Heurich* v. *Sullivan* case the lower Court supplied the words "material deviation" to that case and in doing so antedated their decision by reference to above cited case, which is in fact repealing that law, which is against the prerogatives of the lower Court as it is in violation of the Judicial Power of Article *III* of the Constitution of the United States in such matters. For, had the lower Court used the words "identical terms" as appeared in that case it would have been rather difficult to apply those terms to the statement made in the decision of the lower Court that the substitute plan was better for the petitioners than the terms stated in the contract to which petitioners are not in agreement, but it is rather hard to conceive something better and still be "identical" and that is probably why "material deviation" was substituted. In the *Heurich* v. *Sullivan* case the Court quoting the case of *Crosthwaite* v. *Lebus,* 146 Ala. 525, 41 South 853, stated as follows:

> "A broker is not entitled to commission until he has performed the undertaking assumed by him. The right to compensation depends upon a performance of the stipulations and conditions of the contract of agency, and the broker must act strictly according to the authority conferred upon him by his principal."

As this is cited from a decision in another state, it indicates the national scope of such decision and how overruling that law will affect other jurisdictions.

To overrule a case with a well established precedent is not viewed with favor by this Honorable Court. Such cases are commonly called "doctrine of precedents" as found in *Johnson* v. *Western Union Tel. Co.*, 57 S. E. 122, 144 N. C. 410, 10 L R A NS 256, 119 An St. Rep 961.

In *Kirby* v. *Boyette*, et al, 118 N. C. 244, 24 S. E. 18, the Coourt said:

> "The Supreme Court will not disturb a rule of property announced 15 years before, and then declared to be but an affirmance laid down over 20 years prior thereto no matter what would be the view of such court where the matter before it res nova."

As to the power of Courts to repealing established laws. In the case of *Wood* v. *Brady*, 150 U. S. 18, 14 Sup. Ct. Rep. 6, this Court said:

> "Courts are bound in their very nature to declare what the law is and has been and not what it shall be in the future, and if they were absolutely bound by their prior decisions, they would be without the power to correct their own errors."

As regards property contracts, rules are binding under common law.

In the case of *Richards* v. *Washington Terminal Co.*, 233 U. S. 546, 34 Sup. Ct. Rep. 654, the Court said:

> "A doctrine that has become so well established as to amount to a rule of property should be modified if at all, only by the law making power."

In regards to reversing or overruling decisions as affecting prior rights. In the case of *Larned* v. *Burlington*, 4 Wall 275, and in *Olcott* v. *Fond du Luc County*, 16 Wall 678, it was stated:

"If a contract when made was valid under the Constitution and laws of a state as they had been previously expounded by its judicial tribunal, and as they were understood at the time, no subsequent change in the decisions of the state Courts will be followed to declare the contract invalid or destroy rights accrued under it. Such change in the state decisions can effect subsequent contracts only."

IV

The Letter of Instruction* was not self sufficient in itself nor did respondent secure authorization from petitioners to change copy of contract held by purchaser.

The United States Court of Appeals has apparently considered the 'Letter of Instruction" left with the signed deed and deposited with the Title Company as expressing the terms of settlement. While it is rather difficult to ascertain exactly the importance attached to the letter of instruction and therefore we can only explain that this "Letter of Instruction" did not contain the name of respondent or the consideration, and without mentioning a consideration no contract is valid, and as the consideration was not mentioned orally or otherwise it could hardly be considered self-sufficient and if it did any more than postpone by petitioners the settlement after they, the petitioners waived the breach of purchaser and this after time was made "of the essence of the contract" by a registered letter sent to the petitioners, it is difficult to understand. One of petitioners was asked by counsel of respondent as follows:

"So you sat down on that occasion on May 6th and agreed to postpone the settlement until May 18th?
Petitioner's reply,—That's true (R 173)

If the original alleged contract was invalid then the "Letter of Instruction" doesn't seem likely could have made it valid. In the case of *Swan vs. Scott,* 11 S & R 155, 164, the rule is stated thus:

*Letter of instruction on exhibit "A" with Clerk of Supreme Court.

> "The test, whether a demand connected with an illegal transaction is capable of being enforced at law is, whether the plaintiff required the aid of the illegal transaction, to establish his case."

If the words, "invalid contract" was substituted for the words "illegal transaction" it might apply to this case at bar.

In the last trial regarding the bonus for releasing the then existing trust, a great deal of time was consumed in reference to this bonus but it was not disclosed clearly that the then existing trust could have been released by the payment of a bonus and in reference to refusal to release trust was that it required interest to maturity to obtain that release and photostat copies of former testimonies in prior trials were submitted in argument for a Rehearing to explain the loan could be released by paying interest to maturity. In 12 Am. Jur. 954-957, sections 378 and 379, it explains the obligation of respondent under the alleged contract. In 13 C. J. page 591-592, it states that terms of a tripartite agreement cannot be modified to the detriment of one of the parties by the other two without his consent.

In 12 Am. Jur. Section 36, P 530, By Rejection,—"An offer is terminated by rejection and cannot thereafter be accepted so as to create a contract." A request for a change or modification of a proposed contract, made before an acceptance thereof, amounts to a rejection of it. But a mere inquiry as to whether the proposer of a contract will alter its terms, made before acceptance or rejection, does not amount to a rejection, and if the offer is not withdrawn before acceptance within a reasonable time, the offer becomes a binding contract. A qualified acceptance is a counter offer which rejects the original offer.

In the instant case petitioners accepted the offer only under condition of the notation written on back of their contract by respondent and the release of the then exist-

ing trust was that condition and respondent never fulfilled that condition. And now the question arises did the "Letter of Instruction" incomplete in itself and depending upon the alleged contract sufficient to disregard the notation regarding the release of the then existing trust and was this the basis of considering the alleged contract met by the purchaser? Among other questions requested to be clarified was this question regarding the importance attached to the "Letter of Instruction" that was deposited with the signed Deed with the Title Company on May 6, 1943. But clarification was denied by the United States Court of Appeals.

In attaching more importance to a "Letter of Instruction" than is due such paper writing as has probably been the aim of the lower Court is placing more importance upon such merely postponing privileges granted a purchaser than has been heretofore given such paper writing and as such has jeopardized the interest of the petitioners which is in violation of the Equal Protection Clause of the 14th Amendment to the Constitution of the United States.

V

A too-high-first-trust written into a contract and other irregularities are against public policy and violates the Equal Protection Clause of the 14th Amendment to the Constitution of the United States.

When a purchaser is induced to sign a contract by explaining to him by the broker, that he, the potential purchaser can withdraw from such a sale on account of a too-high-first-trust written into a contract. (Appdx. 23) And this remark concerning such matter had been brought to the attention of all present at the May 6, 1943, settlement meeting and repeated at every trial, and never denied by the purchaser of having made such a statement.

It can be understood how a purchaser by explaining that he cannot secure such a trust or that he has not ample funds to purchase the property with a smaller first trust, that with such an explanation given the vendor, a purchaser could in practically every case withdraw from the sale without any trouble providing the broker would not be antagonistic. But suppose the trick is now turned on the unwary potential purchaser, who is only partly interested, as in the former example, and he signs a contract under similar conditions but instead of being allowed to easily withdraw he is threatened by a suit and is told by the broker that he, the broker didn't know the vendor would be so persistent; and then the potential purchaser finds he has to pay money to get out of the trouble, or else consummate the sale according to the terms of the contract. Such methods harmful to the general public should not be encouraged by the Courts by allowing a written contract signed by purchaser and vendor to be changed as to the terms stated therein.

To allow one party to a contract to withdraw and holding the other party to be strictly accountable to the same contract and then allowing the broker to probably make the contract unenforceable by having the purchaser's copy reading differently than petitioner's alleged contract is violating the Equal Protection Clause of the 14th Amendment to the Constitution.

And, with the decision of the United States Court of Appeals allowing the amount of the first trust and cash payment to be changed because it is not a condition but a privilege which was allowed the purchaser—this will allow the terms of a contract to be changed by the Courts to the detriment of those entering into contractual arrangements, and it will increase litigation in the Courts to a much greater degree than it is at the present time.

For one party to be given the idea that he can withdraw from the contract and not the other party given that

same opportunity is against the Equal Protection Clause of the 14th Amendment to the Constitution of the United States. Such contracts are against public policy and in the case of *Muller* v. *Hoffman*, 174, U. S. 639, 19 Supt. Ct. Rep. 839, the Court said:

> "In all cases where contracts are claimed to be void as against public policy, it matters not that any particular contract is free from any taint of actual fraud, oppression of corruption, for the law looks to the general tendency, and the vice is in the very nature of the contract itself."

In order to make a valid contract the parties thereto must agree to the terms stipulated therein. In the case of *Brown* v. *Mason*, 155 Cal. 155, 98 P. 867, 21 L R A NS 328. The Court stated:

> "The duty assumed by the broker is to bring the minds of the buyer and seller to an agreement for a sale, and the price and terms on which it is to be made, and until this is done his right to commissions does not accrue."

The Court in commenting on the above quotation cited Sibbald v. Bethlehem Iron Co., 83 N. Y. 382, 38 Am. Rep. 441, which case also referred to Koch v. Emmerling, 22 How. (U. S. 72) and others.

CONCLUSION

These essential elements of rights of the citizens to contract in reference to lawful business transaction in which he may desire to engage which is guaranteed by the Constitution of the United States and is supported by common law which we have pointed, namely, (1) the right of the parties to contract, (2) to agree upon certain terms as stipulated into the contract, (3) to rely upon those terms as the basis for negotiation for final settlement, and these are manifestly so inseparately connected with each

other that the destruction or abridgement of one is the negation of the whole of said right to contract, and therefor any decision that wholly or partially destroys one of these elements is unconstitutional and must necessarily apply to and control all, as to this constitutionality of the others. In view of the important federal questions presented and of other questions referred to, the case is an appropriate one for review by this Court.

Respectfully submitted,

BEN LINDAS
Attorney for Petitioners.

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In The

Supreme Court of the United States

October Term, 1946

No. 910

Jane V. Buckner and Leon Buckner
Defendants-Appellants

vs.

Fred A. Tweed, acting as F. A. Tweed Company
Plaintiff-Appellee

Appeal from the United States Court of Appeals for the District of Columbia

---

PETITION FOR REHEARING

Ben Lindas
Counsel for Appellant-Petitioners.

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PETITION FOR REHEARING

On behalf of the defendants-appellants-petitioners, Jane V. Buckner and Leon Buckner; we respectfully petition for a rehearing, being most sincerely convinced, if allowed to stand, will ultimately result in a great injustice to property owners when they wish to dispose of their property through real estate brokerage concerns; and might place some of these property owners in a very precarious position when relying upon the confidence they might place on some real estate brokers who might consider volume of

business rather than the quality of their reliability for honest dealings.

In a jury trial between purchaser and defendants, a decision was rendered in favor of defendants (Appdx. 30 and 31). The verdict which was announced by the foreman of the jury, "No meeting of the minds"; and this verdict was decided before the decision in the former trial between plaintiff and defendants was rendered in favor of defendants; and when counsel for plaintiff argued for a new trial, Judge McMahon, of the trial Court according to transcription of the arguments between counsels for both sides at that time, said:

"A part of the delay in deciding this matter was due to the fact that I had heard that the other case which involved a suit between the owners of the property and the prospective sellers had resulted in a verdict, as I recall it, for the defendants which had been appealed, and I was hoping that we might get a little bit of help from the Municipal Court of Appeals. * * *"

The foregoing will explain the importance attached to that jury trial*; and, why should it not be so, when the subject-matter, "Breach of Contract" is the same in both cases; and, with a jury in one case and a Judge trial in another in which defendants were involved, it would seem that the issues in this instant case had been adjudicated. But, after this instant case was reversed in an appeal, and a new trial ordered; in the second trial Court a much stronger case was presented in favor of defendants not considering the lengthy damaging testimony of one witness who was called to testify in behalf of defendants, and the unreliability of this tsetimony will be touched on later.

We feel certain that had this Court been privileged to see and hear the witnesses, it would have reached the same conclusion as the Judge did in the former trial. And when you consider the Kilbourne vs. Sunderland case, 130 U. S. 505, a fairly similar case in some respects, without

* Certified copy showing *Kasson vs. Buckner* case with Clerk of Supreme Court of The United States.

the complications in the Courts as in this instant case and with of course, though one favorable consideration, the greater amount of money involved, but that does not seem shoud be altogether the controlling factor.

It was possible for the counsel for plaintiff to draw inferences in his oral arguments before the United States Court of Appeals that was not contained in his brief and that was not possible in the trial Court and in this manner affect the decision of the United States Court of Appeals with the result that this Court in reading the opinion of the U. S. Court of Appeals was misled. It is possible that the trial Judge in the first trial could have been wrong in some particulars but not likely to have been as wrong as the U. S. Court of Appeals had held.

We believe that a brief review of the obvious facts, even without conflicting testimony would create a desire of this Court to reconsider this instant case; and surely property owners are concerned about matters that might affect a sale of their property.

If it was not for counsel for defendants at that time in the U. S. Court of Appeals having filed objection to extension of time for filing Appellee's brief of less than 8 pages which was then approximately two months overdue the Petition for Certiorari would no doubt been much more delayed. It is not often that the Court can permit a case to be reargued but owing to new developments and the importance of this case, not only to the parties involved but to the thousands of property owners whose property might be placed in jeopardy should induce this Court to grant a request to reconsider this instant case.

In the U. S. Court of Appeals questions were propounded that if properly answered would have had a vital bearing upon this case in favor of defendants-appellants in that Court. It was stated as folows:

> "Now, when he appended a provision that he, Buckner, should not be put to any expense in the way of

paying the Evening Star any additional consideration above the principal and accrued interest to release the lien. Now, if the Evening Star would under some circumstances and for some consideration accept payment at that time and release the lien, isn't it true that addendum would protect him. But, on the other hand, if the Evening Star would not under any circumstances or any consideration accept payment and release its lien, then wouldn't it be true the original obligation of Buckner comes in to play in that he was required to clear the property of liens, and he was unable to do it at all? If that be true, isn't it clearly very material to know what the record shows as to what the attitude of the Evening Star was, whether it would or would not accept payment at that time?"

Mr. Hilland: "I think it is fair to state the evidence shows they would not accept payment under any circumstances. It is left there in the air; they were asked about that, and they would not release the existing trust, but would increase it to $9500."

It seems obvious that Counsel for plaintiff in former trial as well as in the last time in trial Court had the opportunity not to leave that question in the air. And further counsel heard plaintiff say (tr. p. 29):

"Yes, but I was informed by Mrs. Buckner that it could be paid off."

(tr. p. 38):

"Q. In the former trial, on page 38 of the record, you were asked by Mr. Denit this question:

"Q. Had you had your conversation at the Star before April 18th?

"A. Yes; during the time of my exclusive listing.

* * * *

(tr. p. 39):

"To my recollection, my conversation with the trust holder was after the sellers signed the sales contract."

When the contract was signed between purchaser and defendants it was nearly two months after the listing had

expired and there was no contract of employment after the listing had expired except the contract itself.

In the trial of *Kossow vs. Buckners,* photostat copy of transcription of record was attached to arguments for rehearing in the U. S. Court of Appeals and is now on file with clerk of the Supreme Court, he said: It would have to be refinanced, and a greater trust placed with the Star or otherwise be paid to date of maturity that is correct.

In the former trial one of defendants because there was difficulty in securing a correct explanation of how bonus was calculated was requested to answer questions concerning bonus a number of times as it was explained as date of settlement by one of defendants and it required questioning on 10 different pages as shown on transcription of record before it was at last clearly explained and counsel for both sides of the controversy beside the Judge of the trial Court participated in asking questions on that subject of the bonus. Then also can be found statements involving bonus on pages 12, 17, 18, 24, and 30 of Appendix.

With all these statements regarding bonus it seems it ought to be clear that the then existing trust could have been released by paying interest to maturity.

Then, after a little later, before the U. S. Court of Appeals counsel for plaintiff-appellee stated as follows:

> "After they accepted this contract the appellants decided they did not want to perform it, and they told Mr. Tweed and his salesman they found out the purchaser was a Jew, and they did not want to perform the contract. Plaintiff, himself did not say anything about that in the last trial after he had learned one of defendants was a Jew, and although counsel for plaintiff, I believe had a perfect right to continue along that line of argument, it seems out of place in the United States Court of Appeals under the circumstances."

Is it any wonder with such oral arguments as given before the U. S. Court of Appeals that a decision in favor of plaintiff-appellee in this instant case was secured.

Another peculiarity of this case occurred in the trial Court when a witness who was called in behalf of defendants testified contrary to a letter written by him to one of defendants as regards to advice given this defendant. And further adding lengthy damaging discussion that was supposed to have occurred in the settlement room of the Columbia Title Company but the meeting did not last long enough for such advice according to all the other witnesses. Counsel for plaintiff in arguing for a new trial after former trial in trial Court before Judge McMahon, stated as transcription of record of that argument on page 12, as follows:

> "Mr. Hirshman and Dr. Kossow testified, and Mr. Bradbury testified that there wasn't even time for Mr. Bradbury to get his pen out of the inkwell on May 18th. The foregoing as stated by counsel for plaintiff was a little exaggerated and further was closer to what Mr. Hirshman had testified to, then to the others; but it can be conceded that after the discussion started it did not last long enough for that damaging discussion to have taken place. All one of the defendants heard this witness say was as follows: "Mr. Tweed, you are suposed to be impartial in this case." And his advice being contrary to advice given by letter is conclusive there must have been some mistake; nevertheless the accusation against this witness if conclusively proven which accusation is respectively submitted to be vital and decisive to the justice and the merits of defendants' case. The authenticity and accuracy of defendants' testimony was placed in jeopardy by the misstatements of this witness in defendants' behalf."

COMPLAINT OR CAUSE OF ACTION LACKS CONSIDERATION

It is odd that complaint as stated on page 2 of Appendix does not show consideration in full; it is lacking its essential parts. In the case of Birmingham Ry. Light & Power Co. vs. Littleton, 201 Ala. 141, 77 So. 565, 573, The Court said: (in reference demurrer the Count was held defective) "That if the duty is based on contract it must appear in the complaint that the contract was valid and hence the consideration therefor must be expressly alleged. * * * So, then, if the duty of performance was upon them at all, it must be a binding one upon them and must be shown by the allegations of the complaint. To this end it is just as important to state expressly the consideration for defendants' promise as if the action were in assumpsit.

It is indispensable to the validity of a contract that it should be mutually obligatory upon both parties, or it will be binding upon neither. Bank vs. Steel, 10 Ala. 925; Borst vs. Simpson, 90 Ala. 373, 7 South 814.

He said: (Tr. p. 27): "I explained it thoroughly to Dr. Kossow, the purchaser, that the sellers assumed no responsibility in paying any bonus to pay off the existing first trust that any bonus to be paid would be entirely between he and I, that I would be willing to pay my part of it to pay off the existing trust."

Plaintiff did not fulfill his responsibility or ever intend to do so. If he wasn't obligated to assume that responsibility then the contract lacked mutuality as regards plaintiff and defendants.

In Evans vs. C. S. & M. Ry., 78 Ala. 341, the Court said: "All contracts founded upon mutual promise must

be obligatory upon both parties, so that each may have an action upon it, or neither will be bound by such a contract. The whole doctrine rests though mainly upon the absence of a consideration to support the promise. In order to constitute a contract there must be a concurrence of minds of both parties, as to the same thing."

Plaintiff did not pay the bonus to secure the release of the then existing trust or did he obtain from purchaser a promise that he would assume that expense. And, if by explaining to purchaser that the too-high-first-trust would not bind him to the contract as he could not obtain that amount of money, it was made to secure the purchaser's signature on the contract then should the plaintiff be held to the contract as to his obligation thereto or does the Courts wish to encourage that practice. Surely this method is now not going to be kept a secret—does the Courts wish to uphold a method of unconscionable contracts and thus increase litigation in the Courts; or, is the situation exactly as the Courts desire it and do consider a too-high-first trust written into a contract so that it would allow the purchaser under 99 out of 100 cases to withdraw from the sale if he so decided he did not want the property after all. Instead of the Courts aiding defendants in trying to stop this method of inducing potential purchasers to sign on the dotted line; the decision of the United States Court of Appeals will encourage that method of securing an option to purchase without costing one cent to purchaser and still holding property owners to the contract. With the decision of the jury "No meeting of the minds" how could purchaser be held to the contract. Then it boils down to the fact that the only party who was held to that contract were the defendants. If such a condition is not against public policy then what is?

The opinion (p. 1): In the view we take of the matter; we need not decide whether these variations deprived the contract of binding force as between appellants and the purchaser.

Does not the decision as shown in that opinion lead one to think that the situation of defendants has been correctly explained, and is that what the Courts want? Or, are we correct in thinking that the Courts when once convinced such practice is detrimental to the property owners will find a way to stop that practice—we sincerely believe the Courts will do that very thing when this Honorable Court is convinced such methods should not be encouraged.

TAKING PROPERTY WITHOUT DUE PROCESS OF LAW

Letter of instruction[1] left with deed seems to have given plaintiff the right of a commission. Now, if as the U. S. Court of Appeals infers that defendants never would have consummated the sale, and therefore probably didn't want to, then the letter of instructions was to catch he defendants unaware. But, if it is not the conclusion that defendants were not going through the deal then did not purchaser on May 6, 1943, without a tender after a registered letter had been sent by mail advising the defendants everything would be ready to consummate the sale and then when defendants arrived for settlement at the Columbia Title Company and there was no tender, a breach of the contract by purchaser? The second trust having not even been ordered until May 12th, 6 days later than that settlement meeting. Or was the letter of instruction an artifice in order to entitle plaintiffs to a commission. The Opinion stated (p. 3): Appellant could not by the instructions which they gave to the Title Company, turn the purchaser's privilege into a requirement, so far as the broker's rights are concerned." Then without any consideration and without mentioning the plaintiff's name and being independent of a void contract it must have entitled the plaintiff to a commission. There has not been one argument on that point by counsel for plaintiff or counsel for defendants in

[1] Letter of instruction on exhibit "A" with Clerk of Supreme Court.

the trial courts. As all parties in the case or connected with the transaction thought the letter of instruction was only stating strict compliance to the terms of the contract, it was beyond counsel's desire to even think of arguing that point and therefore defendants were not properly heard on the idea of the letter of instruction left with the deed to independently become that important as to entitle plaintiff to a commission. Under due process of law clause to the 5th Amendment to the Constitution defendants are entitled to be heard. If by postponing the settlement or giving the purchaser another chance to close the deal on strict compliance to contract gives the plaintiff a commission without the purchaser making a tender or showing that he could finance on that substitute plan then defendants were surely put on the spot as had defendants made a written agreement to accept the substitue plan of financing and the purchaser could not have been able financially to close the sale on that substitute plan then in that case there would have been no question but that plaintiff would have been entitled to commission.

And to change the words in the Heurich vs. Sullivan case from "identical terms" to "material deviation." Oh, no, that was not the case, it is by opinion not a change at all—it is still identical terms, except that the $11,000 is changed to $9,500, the down payment from $3,500 to $5,000 and still identical. In either case it is true the defendants get the same amount of money but if they wanted to buy back the house, that is the equity, it would have taken $1,500 more ready cash; and if they wanted to sell the house again it would have been much easier to sell with a $11,000 loan than with a $9,500 loan but nevertheless is it still to be considered identical. The purchaser was borrowing $3,500 from his brother in order to consummate the sale with the $9,500 first trust, but that second trust of $3,500 was it also identical with the $2,450 second trust

to be made to defendant and therefore purchaser could have as easily made out a second trust for $2,450 to defendant as a $3,500 second trust to his brother but would the second trust made to defendant for $2,450 given the purchaser the same amount of ready cash as the $3,500 second trust made to his brother and was that not why a second trust made to brother was on deposit at the Title Company on May 6, 1943, and not the $2,450 made to defendants; but according to what they would like the Court to believe, the all cash was an alternative proposition. (Opinion stated p. 1): The parties met on May 6, 1943, to close the sale. The purchaser proposed to execute a first trust of $9,500 and if appellants desired, to pay the entire balance of the purchase price in cash.

Defendants consider themselves lucky that the purchaser did not insist upon paying all cash above the $9,500 but one witness in a letter to defendants said that is what the purchaser did insist on doing; but this witness also explained that differently at the trial. So taking it that it was an accommodation offer it was to that extent an advantage to defendants as had purchaser insisted on paying all cash above the $9,500, the Court could have explained how much better that would have been than a second trust. So instead of one substitute plan defendants might as well had another. So, when the Courts decide to make contracts for property owners no one will know when they have a binding contract until probably after three years of litigation in the Courts.

Had defendants the opportunity of refuting these arguments by a rehearing it might have given them a chance to be heard on some of these questions providing that counsel for plaintiff is not given the privilege of the last arguments each time when he appears in either one of the Courts of Appeals.

It is obvious by counsel for plaintiff's argument before Judge McMahon in arguing for a new trial page 14, of

the transcription of arguments which is now on exhibit with clerk of the Supreme Court, stated as follows: "If Dr. Kossow had been seeking specific performance of the contract in a court of equity, the court would have to deny specific performance, * * *"

And, further with the verdict, "No meeting of the minds" purchaser could not have been held on that contract. Opinion stated (p. 3): "Appellants urge that a tender by the purchaser was necessary. Appellants' refusal to proceed on the basis of a $9,500 first trust would have dispensed with any such requirement, even apart from the fact that appellants tendered no deed."

A letter attached from the Columbia Title Company that was attached to the arguments for a rehearing and now with clerk of Supreme Court states in part as follows: If at the date of settlement, the money has not been deposited with us, then it is not necessary for the grantor to execute and acknowledge the deed, and if the deed, properly executed and acknowledged, is in the possession of the grantor, delivery to us would not be requested.

(Appdx. 12) under Statement of Proceeding and Evidence it states: "At the May 18, 1943, meeting, the defendants, had with them, the properly executed deed for the property."

In the case of Stoddard vs. Abercrombie, et ux, 266 P. 431, 166 Idaho 69, the Court said, in part: "Idle ceremony to have tendered deed."

But defendants were denied the opportunity to be heard on this question. We believe this is a question to be decided finally by the United States Supreme Court.

One of defendants signed letter of May 7, 1943, addressed to The Columbia Title Company which states in part as follows:

> "Please notify me when the purchaser has made settlement in accordance with the terms of the contract, or has furnished you evidence that he is in a position to make the settlement."

Now, if purchaser had made tender defendants were to be notified but they were not so notified by the Columbia Title Company because the purchaser had not made a tender. This letter is now on exhibit with clerk of the Supreme Court.

In the Kossow vs. Buckner jury trial, the verdict was in the favor of defendants and how the jury came to its conclusions no one knows except the letter of instructions was mentioned in that trial. If the issues are presented to the jury and in their verdict neither issue is singled out the verdict is supposed to be on all issues. Therefore the importance of the letter of instructions was also decided by that jury.

In Lavender vs. Kurn, a very recent case, in supplement, Law Ed. vol. 90, p. 693, this Court said:

> "The appellate court's function is exhausted when the evidentiary basis of the verdict becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

Had defendants been heard concerning the importance of the letter of instructions many arguments could have been presented on that rehearing concerning the importance of that letter and further had defendants thought the United States Court of Appeals would have attached such importance to that letter the defendants would not have appealed the case.

It seems that the U. S. Court of Appeals based its decision on the letter of instruction still the contents of that letter was not on file with that court in the transcript of the record.

PRINCIPLES APPLICABLE TO FIDUCIARY RELATIONS—REPRESENTING BOTH PARTIES IS NOT IN HARMONY WITH THOSE PRINCIPLES

The contract with the price stated therein was brought to defendants with their signatures attached thereto. The

listing was for $19,500, the contract price $16,950; $2,550 less than the listing price, quite a reduction from that price, but as the listing contract had expired that probably made no difference. (tr. 45): Q. That isn't what you said. I ask you again, to get it perfectly clear. Did you, or did you not, answer "yes" to this question? A. I did.

Mr. Stafford: The question is, Mr. Reporter: "You were of the opinion that it was worth $19,500 on April 18, 1943." The Witness: I did.

Defendants were sued by purchaser in a trial by jury and plaintiff was expert appraiser for purchaser and without plaintiff's statement that the property was worth $19,500 there would not have been any basis for damages. But in an action against principal, agent is privy to principal. In Restatement of Law, Agency, ch. 13, sec. 399, pages 906-907, it states as follows:

> "If after the agent has received such notice, the principal is unsuccessful in the suit and, after a defense in good faith is required to pay, the issues therein involved are res judicata between them."

Surely plaintiff was at fault for "No meeting of the mind" verdict of the jury which did would have resulted in favor of defendants.

Here, then is plaintiff who should act with loyalty to his principal but is in collusion with purchaser. And further purchaser never tendered a settlement; and, after sending defendants a notification that everything would be ready and this notification by registered mail, and this appeared to two settlement meetings. There was also another notification of a different settlement meeting. How many times is a purchaser allowed to notify vendor to attend a settlement meeting and then be excused for not being prepared to make a tender.

In regards to the $3,500 second trust to brother of purchaser that was kept a secret from defendants as to amount

of same. It is the duty of a broker to disclose such financial conditions of purchaser.

Then plaintiff agreed to a $43 bonus for purchaser when he must have known from his experience that it would not be enough money to release that type of loan and that he, the plaintiff, had no intention to pay the balance. Does not these actions as heretofore enumerated constitute Double-dealing as explained in the Kilbourne vs. Sunderland case in supra which case originated in the District of Columbia and does not this instant case present more constitutional questions, more conflicting opinions between the Courts, and also present is a closely adjudicated jury trial in favor of defendants, and are those not questions on which certiorari are granted.

CONCLUSION

In conclusion, we urge this Honorable Court to reconsider the petition filed herein, and reverse the findings of the Court below.

Respectfully submitted,

BEN LINDAS

Counsel for Appellant-Petitioners.